82-946

Supreme Court, U.S.
FILED
NOV 16 1982
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE
UNITED STATES

* * * * * * * * * * * * * * * * * * * *

NO.

* * * * * * * * * * * * * * * * * * *

LARRY WAYNE BOX,

Petitioner

V.

THE STATE OF ALABAMA,

Respondent

* * * * * * * * * * * * * * * * * * *

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF ALABAMA

* * * * * * * * * * * * * * * * * * *

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QUESTION PRESENTED

Whether the warrantless search and seizure of Petitioner and Petitioner's automobile was justified under the probable cause exception to the Fourth Amendment of the United States Constitution and absent a showing that the incriminating objects were in "plain view" or apparent to officer at the time of seizure.

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TABLE OF AUTHORITIES

CASES:

Coolidge v. New Hampshire, 403 U.S. 443 (1971).

Daniels v. State, 290 Ala. 316, 276 So. 2d 441 (1973).

Foy v. State, 387 So. 2d 321 (Ala. Ct. Crim. App., 1980).

Henry v. U.S., 361 U.S. 98, 4 L.Ed. 2d 134, 80 S.Ct. 168 (1959).

Kinard v. State, 335 So. 2d 924 (Ala. Sup. Ct., 1976).

Mapp v. Ohio, 367 U.S. 643, 6 L.Ed. 2d 1081, 81 S.Ct. 1684 (1961).

Shipman v. State, 291 Ala. 484, 282 So. 2d 700 (1973).

Stanley v. Georgia, 394 U.S. 557 (1968).

ARTICLES:

Bloodworth, Where Search and Seizure is Today, 40 Alabama Lawyer 444 (October, 1978).

PETITION FOR A WRIT OF CERTIORARI
TO THE ALABAMA COURT OF CRIMINAL APPEALS

* * * * * *

Petitioner, Larry Wayne Box, prays that a Writ of Certiorari be issued to review the judgment of the Alabama Court of Criminal Appeals entered on June 29, 1982, affirming his conviction under the provisions of Title 20 Section 2-20 et seq, otherwise known as the Alabama Uniform Controlled Substances Act. As charged in his indictment, and that upon such hearing being granted, the judgment of conviction be reversed.

OPINION BELOW

The opinion of the Alabama Court of Criminal Appeals (app. A., infra,. p. 1a) has been reported and is included herewith. Certiorari was denied by the Alabama Supreme Court without opinion.

JURISDICTION

The judgment of the Alabama Court of Criminal Appeals was entered on June 29, 1982, and following a refusal of certiorari by the Alabama Supreme Court, a stay of mandate pending possible review by this court was granted until November 17, 1982.

The Court has jurisdiction under U.S.C. Section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution and Title 20, Section 2-20, et seq., Code of Alabama 1975.

STATEMENT OF THE CASE

The Petitioner, Larry Wayne Box, along with one Danny Bice were on November 17, 1979, in unlawful possession of controlled substances (cocaine and marijuana) contrary to and in violation of the provisions of the Alabama Uniform Controlled Substances Act. The State contended that the case arose out of a surveilance by narcotic officers, prompted by information received from a confidential informant, that narcotic activity involving Petitioner and Bice was occurring at a house in Birmingham, Alabama allegedly occupied by Petitioner.

On November 14, 1979, a search warrant was issued for a home located at 2729 Center Point Road, Birmingham, Jefferson County, Alabama. Sgt. Brooks who was assigned to the narcotic detail in November

1979, set up surveilance on the home. He observed Box, an individual named Danny Bice and others at the home at various times over the next few days. He observed Mr. Box removed some garbage bags from the home during this period and attempted to stop him leaving on two occasions prior to the subsequent search and seizure. Sgt. Brooks testified he had not seen Mr. Box do anything wrong in violation of any traffic laws.

On November 17, 1979, Box was seen arriving at the house in his automobile. He got out of his car and went to a weeded area near the house. Box search around in the weeds for a short time and picked up some small plastic bags which were seen to contain something white in the bottom of the bags. Box was then stopped by law officers as he attempted to leave the premises in his car and arrested. A paper sack was taken from an open purse lying on the front seat of the car. The purse belonged to a female passenger occupying the car with Box. The sack was later found to contain a white powdery substance identified as cocaine. After the arrest of Petitioner, the warrant was executed and the

house searched.

It is clear that on the day of the arrest of Box, and the entry into the house, Box did not enter the premises. The arrest report stated that the white powder was concealed in the girl's purse in a brown paper bag.

Furthermore, the evidence is without dispute that Box was not in the house, or any of the houses, at 2729 Center Point Road, Jefferson County, Alabama. Yet, the search warrant was served on him. And he was NOT named as a resident in the warrant, now was the name of Box mentioned in the affidavit to obtain the search warrant.

Given these facts, together with others to be mentioned, the analysis of this case now on appeal warrants a discussion of: (1) the search warrant and the search, (2) the arrest of Box, and (3) the seizure of the material which later proved to be cocaine from the purse of the girl passenger in the automobile of Box on November 17, 1979.

REASONS FOR GRANTING THE WRIT

The most basic constitutional rule pertaining to warrantless searches states that such searches "'are per se unreasonable under the Fourth Amendment - subject only to a few specifically established and well-delineated exceptions.' The exceptions are 'jealously and carefully drawn' and these must be a showing by those who seek exception . . . that the exigencies of the situation made that course imperative.' 'The burden is on those seeking exemption to show the need for it.'" Coolidge v. New Hampshire, 403 U.S. 443, (1977). It is submitted that the arresting officer had no reasonable grounds to believe that Petitioner was at the time of his arrest committing a crime or was otherwise engaged in any activity which could have given rise to probable cause to effect an arrest or search.

There is no evidence in the record that the law enforcement officer had identified the substance in the plastic bags which Box obtained from the weeded area near the house as cocaine, or that he reasonably thought the substance to be cocaine, contraband, or a controlled substance.

The arresting officer further admitted that Box had violated no law, and was violating no law at the time the vehicle was stopped.

The plastic bags, which proved later to contain cocaine, were in a brown paper bag, and were not visible until the bag was opened. Further, the report shows that this paper bag was concealed in the purse of the girl passenger in the car.

The search and seizure, or seizure, rules apply here, and a compilation of the federal, and some state, cases on the subject is contained in Bloodworth, Where Search and Seizure is Today, 40 Alabama Lawyer 444 (October, 1978).

Of primary importance to this case are Shipman v. State, 291 Ala. 484, 282 So. 2d 700 (1973); Daniel v. State, 290 Ala. 316, 376 So. 2d 441 (1973); Kinard v. State, 335 So. 2d 924 (Ala. Sup. Ct., 1976). See also, Foy v. State, 387 So. 2d 321 (Ala. Ct. Crim. App., 1980).

Based upon the foregoing authorities, it is submitted that the arresting officer had no reasonable grounds to believe that Box was at the time of his arrest committing a crime or was otherwise engaged in any activity which could have given rise to probable cause

to effect an arrest or search. The officer admitted that at the time Box was violating no law, and he did not, prior to the arrest, have any judgment about was was contained in the plastic bags which Box obtained from the field. There is no statement in this record of any such judgment.

There was no cry by either of the occupants of the car about "dope," as occurred in Foy, supra. Evidence similar to that which appears in Foy to uphold probable cause simply is not present in this case. While there may have been a "good faith" arrest, there were no other facts and circumstances which would lead a prudent man to believe that Box had committed or was committing any crime. See Henry v. U.S., 361 U.S. 98, 4 L. Ed. 2d 134, 80 S. Ct. 168 (1959).

Thus, it is submitted, the evidence seized from the automobile of Box on November 17, 1979, was incident to an unlawful arrest, and, hence, was inadmissible. See Mapp v. Ohio, 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961).

The present case is remarkably similar to the facts in Kinard, supra. There the Alabama Supreme Court held there could be no justification for the

initial intrusion where there was only a stop of a vehicle for an I.D. check, and, further, that the "plain view" doctrine was applicable where the incriminating nature of the object was not apparent to the officer at the time of its seizure. In the present case, it is without question that the incriminating nature of the contents of the brown bag was not apparent until the bag had been opened, if then.

In Coolidge, supra., the United States Supreme Court stated that the "plain view" cases have a common factor. This common denominator is that the officers in each case had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused. The extension of this justification can be approved only where it is immediately apparant to the police that they have evidence before them. The "plain view" doctrine may not be used to extend a general exploratory search from one object to another until something incriminating is discovered. Stanley v. Georgia. 394 U.S. 557, (1968).

Thus, even assuming, without conceding, that the stop here was justified, there could be no seizure because the incriminating nature of what was in the brown paper bag was not apparent to the seizing officer. Shipman, supra.

This rule is stated in Shipman, thusly, at 291 Ala. page 448:

> "For an item in plain view to be validly seized, the officer must possess some judgment at the time that the object to be seized is contraband and that judgment must be grounded upon probable cause. The record in this cause reveals that this requirement has not been met."

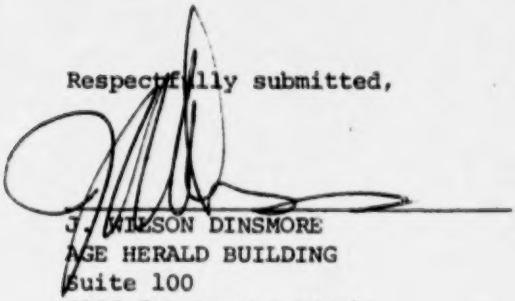
The requirement was not met here because there is nothing in the record to show that the officer had any probable cause which could lead to a judgment that there was cocaine, or other contraband, in the brown paper sack seized from Petitioner's car.

The constitution demands redress. The Petitioner pleads for it.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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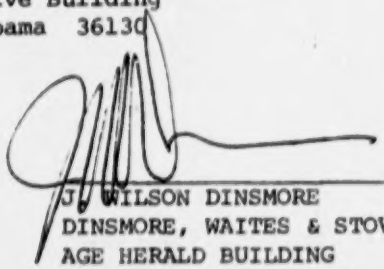
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari has been mailed, postage prepaid, this the 12th day of November, 1982, to:

Honorable Charles A. Graddick
Attorney General - State of Alabama
250 Administrative Building
Montgomery, Alabama 36130



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June 8, 1982

APPENDIX A

THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1982-82

6 Div. 507

Larry Wayne Box

v.

State

Appeal from Jefferson Circuit Court

ON RETURN TO REMAND

CLARK, RETIRED CIRCUIT JUDGE

In accordance with previous order remanding this case to the trial court for clarification of the question whether defendant was adjudged guilty under both counts of the indictment and, if not, whether he was adjudged guilty of possession of cocaine, as charged in the first count, or, on the other hand, whether he was adjudge guilty of possession of marijuana, as charged in the second count, the return of the trial court shows by its amendment to the judgment nunc pro

tunc that defendant was not found guilty under both counts but that he was found guilty under County One only, which charged possession of cocaine. It thereby become unnecessary for us to consider the issue raised by appellant pertaining exclusively to the second count, which charged defendant with the possession of marijuana.

The single issue as to the first count of the indictment is thus stated in appellant's brief:

> "Was the seizure of what later proved to be cocaine from the automobile of defendant valid?"

As hereinafter explained, we conclude that it was.

A large part of the evidence consisted of the testimony of Sergeant Jim Brooks of the Narcotics Division of the Jefferson County Sheriff's Department. He testified that on November 11, 1979, he received information from a Center Point confidential informant that narcotics activity involving defendant and another person was occurring at one of three houses located at 2729 Center Point Road in Jefferson County. The three houses were located close together; the occupants used the same address and a common driveway from the highway to the curtilage of each house. On November

11 and 12, 1979, Sergeant Brooks and others closely watched the houses, but they saw no activity at that time. On November 13 he conducted surveillance again. He testified that about 10:50 p.m., 10:45, or 10:50, p.m., the defendant returned and he and Danny Bice loaded some more sacks, "and all into the car," and they locked up the house, locking the front door, and they left the scene. The witness stated that surviellance was maintained at the same "observation point" until daylight of the morning of November 14; he resumed it about noon, with the understanding that another officer was in the process of obtaining, or had obtained, a search warrant for the house. The witness further testified that he then maintained surveillance of the area at intervals, including a large part of the night of November 16-17 when the arrest of Box occurred. At that time, the brown paper bag was seized inside which the plastic bags containing cocaine were discovered.

Appellant cites numerous authorities on the general subject of Search and Seizure, but fails, in our opinion, to show an un reasonable search and seizure as to the cocaine that was found in the

automobile. We do not agree with the statement of appellant, "Based upon the foregoing authorities, it is submitted that the arresting officer had no reasonable ground to believe that Box was at the time of his arrest committing a crime or was otherwise engaged in any activity which could have given rise to probable cause to effect an arrest or search." On the contrary, we think that the officers at the time had much more information and knowledge than was required to give them probable cause for believing Box was at the time, and had been for several days, engaged in violation of the Alabama Uniform Controlled Substances Act, and they were justified in making an arrest of him at the time. Nor are we in agreement with either of the apparent conclusions of appellant as found in each of the two following sentences in his brief:

> "The plastic bags, which proved later to contain cocaine, were in a brown paper bag, and were not visible until the bag was opened. Further, the report shows that this paper bag was concealed in the purse of the girl passenger in the car."

Although it may not be conclusive that the "plastic bags" were "visible" to the officers as they looked into the automobile, it is conclusive that they were

visible to Sgt. Brooks at the time defendant picked them up and took them to the automobile where they were placed in the brown paper bag. As to the second sentence, instead of the paper bag being concealed in the purse, the testimony of Sergeant Brooks was as follows:

> "Q. In fact, it will be your testimony that you saw that?
>
> "A. That is what I thought I saw. I thought that it was on the purse, you know.
>
> "Q. I understand. Are you saying that you are not sure now and that it could have been concealed in the purse?
>
> "A. Well, the brown paper bag, a portion of it was in the purse. Part of it was on the purse.
>
> "From my field of vision, from my line of sight, from where I first appeared to see."

The paper sack that contained the plastic bags that contained white substance that proved to be cocaine was partly in an open purse and in plain view of the officers at the time they arrested Mr. Box and took possession of the automobile. They knew that only a few moments before he had manual possession of the sack and its contents. In taking the Defendant and the automobile into their custody, it was their

right and duty to take possession of the sack and its contents. There was no violation of appellant's right to security against unreasonable searches and seziures, and we find no support for such insistance in any of the authorities relied upon by appellant.

We find no error in the record prejudicial to defendant. The judgment of the trial court should be affirmed.

The foregoing opinion was prepared by Retired Circuit Judge Leight M. Clark, serving as a judge of this Court under the provisions of ¢ 6.]0 of the Judicial Article (Constitutional Amendment No. 328); his opinion is hereby adopted as that of the Court. The judgment of the trial court is hereby

AFFIRMED.

All the Judges concur

Appendix B

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

September 17, 1982

RE: 81-865
Ex Parte: Larry Wayne Box
PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS
(Re: Larry Wayne Box vs. State of Alabama)
Appellant Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

_____ Appeal docketed. Future correspondence should refer to the above number.
_____ Court Reporter granted additional time to file reporter's transcript to and including
_____ Clerk/Register granted additional time to file clerk's record/record on appeal to and including
_____ Appell____ granted 7 additional days to file briefs to and including
_____ Appellant(s) granted 7 additional days to file reply briefs to and including
_____ Record on Appeal file
_____ Appendix Filed
_____ Submitted on Briefs
XXXXXX Petition for Writ of Certiorari denied. No opinion. ADAMS, J. -- TORBERT, C.J., FAULKNER, ALMON AND EMBRY, JJ., CONCUR.
_____ Application for rehearing overruled. No opinion written on rehearing.
_____ Permission to file amicus curiae briefs granted

_____

/s/ Dorothy F. Norwood
Acting Clerk, Supreme Court
of Alabama

82-946

Office - Supreme Court, U.S.
FILED
DEC 20 1982
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE
UNITED STATES

NO. _____

LARRY WAYNE BOX,
Petitioner

vs.

STATE OF ALABAMA,
Respondent.

IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

CHARLES A GRADDICK
ATTORNEY GENERAL

AND

J. ANTHONY McLAIN
SPECIAL ASSISTANT ATTORNEY GENERAL

JAMES F. HAMPTON
SPECIAL ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR THE RESPONDENT

Attorney General's Office
64 N. Union Street
Montgomery, AL 36130

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QUESTION PRESENTED

WHETHER THE WARRANTLESS SEARCH AND SEIZURE OF THE PETITIONER AND HIS AUTOMOBILE WAS JUSTIFIED?

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

Sergeant Jim Brooks of the Narcotics Division of the Jefferson County, Alabama, Sheriff's Department received information from a confidential informant that narcotics activity involving the Petitioner and another was occurring at a residence located in Jefferson County. Sergeant Brooks and fellow law enforcement personnel conducted surveillance of the residence in question.

The Petitioner and one Danny Bice arrived at the residence in a 1974 blue Ford Torino driven by the Petitioner. Bice took a small brown sack into the house and he then helped the Petitioner load three large, green garbage bags filled with an unknown substance into the truck of the car. The Petitioner drove away in the car, with Bice apparently staying at the house. A chase car was notified and attemped to apprehend the Petitioner, but lost his vehicle in heavy traffic.

Bice was subsequently observed through a window in the house "cutting" cocaine with a "poker" card and a razor blade. The Petitioner returned and he and Bice loaded more sacks into the car and left the house.

Surveillance was continued under the understanding that another officer was in the process of obtaining or had obtained a search warrant for the house. Sergeant Brook subsequently observed the '74 blue Ford Torino arriving back at the house. The Petitioner got out of the car and walked into a wooded area near the house and began searching in the weeds. He then returned to the car and backed it nearer to the house. He got out of the car again and returned to the same area he searched earlier. He picked up some small plastic bags partially filled with a white substance. He returned to the car and placed the plastic bags in a brown paper sack. He then drove away

from the house but was blocked by a police car. Police surrounded the Petitioner's vehicle.

Sergeant Brooks identified himself to the Petitioner. The Petitioner and his female companion got out of the car. Sergeant Brooks looked into the car after the Petitioner got out and observed an open purse lying on the front seat with a brown paper sack in the top of the purse. The brown paper sack was confiscated. The plastic bags found therein contained cocaine.

ARGUMENT

REASONS FOR DENYING THE WRIT

The Petitioner urges that the law enforcement officer (Sergeant Broooks) "had no reasonable grounds to believe that Box (the Petitioner) was at the time of his arrest committing a crime or was otherwise engaged in any activity which could have given rise to probable cause to effect an arrest or search": (Petitioner's Petition for a Writ of Certiorari, pp.7-8). The factual shortcoming of this argument was fully addressed by the Alabama Court of Criminal Appeals. (See Appendix A of the Petition).

Law enforcement personnel had observed the Petitioner and Bice load plastic garbage bags full of unknown material into the car driven by the Petitioner. Bice was seen taking a brown paper sack from the car into the residence under surveillance. He was then observed inside the house "cutting" cocaine. The Petitioner was then observed

taking the plastic bags of cocaine from the yard near the house and placing them in a brown paper sack. The brown paper sack was then observed by Sergeant Brooks in the front seat of the car as the Petitioner and his companion exited the vehicle. The Petitioner and the autombile were taken into police custody as was the brown paper sack and its contents.

The Respondent submits that the facts known to authorities at the time of the seizure were more than sufficient to establish reasonable grounds to believe the Petitioner was, at the time of his arrest, committing a crime or was otherwise engaged in activity which gave rise to probable cause to effect an arrest. Further, the brown paper sack containing the plastic bags containing the white substance was in plain view of the officers at the time the Petitioner was arrested and the automobile was taken into possession of the police.

The inapplicability of the cases relied upon by Petitioner are obvious from a review

of the factual dissimilarities from the case at bar. "The case of Kinard v. State, 335 So. 2d 924 (Ala. 1976) involved an initial intrusion by a stop of a vehicle for an I.D. check. In the case at bar, authorities had observed the Petitioner place several plastic bags containing a white substance into the brown paper sack. A short time earlier, this same surveillance team watched the Petitioner and Bice load garbage bags full of unknown material into the Petitioner's car and saw Bice "cutting" some cocaine inside th house. This constituted a more justifiable intrusion by police than a vehicle stop for a I. D. check. These facts further negate the Petitioner's argument that Coolidge v. New Hampshire, 403 U. S. 443 (1977), does not apply, there allegedly being no justification for an intrusion whereby the police inadvertently came across evidence incriminating the accused. The brown paper sack was in the plain view of Brooks. Petitioner

had just been observed placing plastic bags containing a white substance into the brown paper sack.

The Respondent would finally contend that the facts of this case fall well within the standard of Shipman v. State, 291 Ala. 484, 282 So.2d 700 (1973), another case relied upon by Petitioner:

> " For an item in plain view to be validly seized, the officer must possess some judgment at the time that the object to be seized is contraband and that judgment must be grounded upon probable cause." 291 Ala. at 448.

Brooks positively possessed such judgment which judgment was grounded in his observation of the activities preceding the seizure of the contraband.

CONCLUSION

The Respondent respectfully submits that based on the foregoing, the Petitioner's Petition for a Writ of Certiorari to the Supreme Court of Alabama be denied.

Charles O. Graddick

CHARLES A. GRADDICK
ATTORNEY GENERAL OF ALABAMA

Anthony McLain

ANTHONY McLAIN
SPECIAL ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I, J. Anthony McLain, a Special Assistant Attorney General of Alabama, and a member of the Bar of the Supreme Court of the United States and one of the attorneys for the State of Alabama, respondent, do hereby certify that on this date DECEMBER 16, 1982, I did serve a copy of the requisite number of the foregoing on the attorney for the petitioner by mailing the same to him, first class postage prepaid and addressed as follows:

J. Wilson Dinsmore
2107 5th Ave., N
Age Herald Building
B'ham, AL 35203

J. Anthony McLain
Special Assistant Attorney General

Address of Counsel:
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Montgomery, AL 36130